(2)

No. 90-911

In The

Supreme Court of the United States

October Term, 1990

INTERSTATE BRANDS CORPORATION,
Butternut Bread Division,

Petitioner,

vs.

CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 135,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Certain omissions and inaccuracies in the Statement of the Case presented by Petitioner Interstate Brands Corporation, Butternut Bread Division (hereinafter "Petitioner" or "Interstate") require that Respondent Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 135 (hereinafter "Respondent" or "Local 135") supplement Petitioner's Statement of the Case.

In addition to jurisdiction pursuant to 28 U.S.C. §1331, the United States District Court, Southern District of Ohio, Western Division, had jurisdiction of this matter under Section 301(a) and (c) of the Labor-Management Relations Act, as amended, 29 U.S.C. §185(a) and (c), which provides as follows:

> **(a) Venue, amount, and citizenship.** Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> * * *
>
> **(c) Jurisdiction.** For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

The grievance procedure of the collective bargaining agreement between Interstate and Local 135 requires that a grievance be filed within fifteen (15) days "of its *occurrence*, or the parties' *awareness* thereof" [emphasis added] (Petitioner's Appendix at A60).

In its Statement of the Case, Interstate sets forth certain facts concerning the events which gave rise to the underlying grievance. In so doing, Interstate did not confine itself to the facts found by the arbitrator, but included references to selected testimony from the arbitration hearing which was not specifically credited by the arbitrator and which was controverted by other testimony. While Local 135 questions the propriety of relying on such evidence in its Argument *infra*, in order to present a more accurate picture and comply with Rule 15.1 of this Court, Local 135 is compelled to draw the Court's attention to other portions of the arbitration transcript should the Court find it necessary to look beyond the arbitrator's findings.

In his initial award, the arbitrator made the following factual findings regarding the conduct of the grievant, Randy Furst, which led to his discipline by Interstate:

> (1) Mr. Furst and a friend attended a baseball game of the Cincinnati Reds in Cincinnati, Ohio on April 11, 1984 (tr 128). Mr. Furst took a considerable amount of beer to the game (tr 129).
>
> (2) On the way home to Indiana from the game, Mr. Furst and his friend stopped on a road near the Cincinnati Airport (Ky. 20). Police officer David W. Brunning [sic], who is an officer employed by the Kenton County Airport Authority, checked out the stopped vehicle.

(3) Furst and his friend explained they had stopped to let the motor cool off, but officer Brunning [sic] testified that the motor was still running (tr 23).

(4) Officer Brunning [sic] discovered Mr. Furst in a disoriented condition, speech slurred and with the smell of alcohol on his breath (tr 42).

(5) Officer Brunning [sic] noted blood on grievant Furst's arm (tr 34). Mr. Furst told officer Brunning [sic] that he was in the process of shooting cocaine. He had pulled out a syringe and laid it on the floor (tr 35). Needle marks were all up and down both arms of the grievant (tr 35).

(6) Cocaine, marijuana and drug paraphanalia [sic] were found in the van (tr 33, c 2). Mr. Furst was indicted in Kentucky for the possession of cocaine, marijuana and drug paraphanalia [sic] (tr 37, c 4).

(7) Upon recommendation of officer Brunning [sic], the court ordered the placement of grievant Randy Furst in a diversion program (tr 38, 39, u 2) which involves the following:

(a) Participation in a rehabilitation program

(b) Must be an outpatient or inpatient

(c) Stay out of trouble for one (1) year

(d) If grievant does not agree or if he breaks agreement, Mr. Furst is subject to be tried on the charges

(e) Charges will not be dropped until the diversion program is completed

(Petitioner's Appendix at A31-32). With regard to Furst's drug use, the arbitrator found *only* that "Randy Furst did

use cocaine on April 11, 1984" (Petitioner's Appendix at A36).

Interstate quotes further arbitration testimony from the police officer concerning statements allegedly made by Furst about the extent of his drug habit. Nowhere in his award did the arbitrator incorporate or credit this testimony. Not only did the arresting officer inexplicably fail to record Furst's alleged admissions in his report (Respondent's Appendix at A2), but Furst testified at the hearing that he had never used cocaine until about ten (10) days prior to his arrest (Respondent's Appendix at A4-5). Further, Furst denied both that he was a "regular cocaine user" and that he told the arresting officer that he was an addict (Respondent's Appendix at A6, 8). Finally, *undisputed* testimony by the police officer establishes that Furst had not been driving but was sitting in the passenger seat of the parked van and that it was his friend who had been driving the van (Respondent's Appendix at A3).

Interstate never discharged Furst as a result of his arrest, but, instead, placed him on an indefinite suspension that would last until the criminal charges were "dismissed proving his innocence" (Petitioner's Appendix at A32). The arbitrator found that because of the status of the criminal proceedings against Furst (at the time of the initial award, an uncompleted one-year diversion program) "proving your innocence may be a difficult or impossible act" (Petitioner's Appendix at A36).

Furst filed a grievance that protested that his suspension was "without just cause" and requested the remedy of reinstatement and back pay (Petitioner's Appendix at

A29). In its Statement of the Case, Interstate contends that the issue of the appropriate remedy should the arbitrator sustain the grievance was not before the arbitrator (Petitioner's Brief p. 7). This statement is not one of fact, but of argument by Interstate. The grievance, which requested reinstatement and back pay, clearly placed the remedy in issue. In any event, the scope of the arbitrator's authority to fashion a remedy was not raised by Interstate before the Sixth Circuit, nor has it been raised as an issue before this Court.

In supplemental proceedings before the arbitrator as the result of a remand to the arbitrator by the District Court on the issue of back pay, the parties stipulated certain facts without agreeing that all of the facts were relevant to the arbitrator's determination (Petitioner's Appendix at A42). The stipulations revealed, *inter alia*, that more than two years after his disciplinary suspension Furst was twice charged with driving while under the influence, and that upon the second occasion, his driver's license was suspended for 30 days (Petitioner's Appendix at A40-41). In a procedural ruling concerning what matters were relevant to his determination, the arbitrator refused to consider these remote post-suspension incidents in his supplemental award issued on August 20, 1988 (Petitioner's Appendix at A47-48). The arbitrator ordered Interstate to reinstate Furst effective October 11, 1984, six months after his arrest, and to pay back pay and benefits, less interim earnings and unemployment compensation, for the time lost.

SUMMARY OF ARGUMENT

I. Waiver of Judicial Determination of Substantive Arbitrability Questions Decided by the Arbitrator.

The case below does not present an appropriate opportunity for this Court to decide the first question presented for review by Petitioner regarding waiver of the right to judicial determination of substantive arbitrability questions which are submitted to and decided by the arbitrator. The grievance timeliness issue decided by the arbitrator in the underlying grievance in this case was a question of procedural arbitrability, rather than a question of substantive arbitrability as found by the Sixth Circuit below. As a procedural question, grievance timeliness was a matter for the arbitrator to decide and not the court, and Petitioner thus is not entitled to judicial determination of the issue as argued to this Court. The Sixth Circuit, therefore, reached the correct result in its refusal to overturn the arbitrator's timeliness ruling. The purported conflict can be resolved on other grounds because this case does not present appropriate facts for resolution of the question presented for review. The Sixth Circuit's failure to find that grievance timeliness was a question of procedural arbitrability is the result of a conflict within the Sixth Circuit concerning whether such an issue is procedural or substantive. This Court does not sit to address intra-circuit conflicts or decisional confusion.

II. The Scope of the Public Policy Exception To Enforcement of Arbitration Awards.

Due to dispositive distinguishing facts in the case below, no conflict exists with other circuit courts on the

relevance of underlying employee conduct and the precision with which public policy must be defined when determining whether an arbitration award is against public policy. All of the cases which Petitioner contends are in conflict refused to enforce arbitration awards reinstating employees who engaged in misconduct while performing their job duties. The present case, in which the Sixth Circuit enforced the arbitrator's award, involved discipline for an employee's off duty conduct. When the so-called opposing circuits cited by Petitioner have been called upon to make public policy determinations in cases involving discipline of employees for off duty conduct, they have reached the same conclusion as did the Sixth Circuit here that such awards do not violate public policy. Accordingly, no true conflict exists among the circuits, and regardless of the rationale employed by the Sixth Circuit below, the same result would obtain under either of the allegedly conflicting approaches. Moreover, a subsequent case from the Second Circuit involving on duty employee misconduct is currently pending before this Court on Petition for Writ of Certiorari and would provide an appropriate vehicle for resolving the question presented by Petitioner because that case squarely presents a decisional conflict among the circuits.

ARGUMENT

I. Reasons Why The Petition Should Be Denied.

This case does not present an appropriate opportunity for this Court to decide the questions presented for review because no dispositive conflict exists between the

decision of the Sixth Circuit in the case below and the decisions of other United States Courts of Appeals. Because the case below presents determinative material factual differences from cases decided by other United States Courts of Appeals purporting to reach the same issues, no true decisional conflict exists. Thus, resolution of the issues stated by Petitioner will not change the result below, and this Court can dispose of the case at bar on other grounds.

II. This Case Does Not Present An Appropriate Opportunity To Consider Whether A Party Who Submits to Arbitration Waives The Right To Judicial Determination Of Substantive Arbitrability Questions Under A Collective Bargaining Agreement.

Before reaching the issue of whether the arbitrator's award should be vacated on public policy grounds, the Sixth Circuit in the case below was called upon to determine whether the arbitrator's ruling that the underlying grievance was timely filed was proper. Petitioner Interstate argued alternatively that the timeliness issue raised a question of substantive (subject matter) arbitrability subject to *de novo* review by the court, or that the arbitrator's ruling should not be enforced because it did not "draw its essence from the contract." Respondent Local 135 asserted that the timeliness issue was a question of procedural arbitrability subject to the "affirmative misconduct" standard of review mandated by this Court in *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 40 (1987), and that the arbitrator was exercising his proper function of contract interpretation in making his ruling.

In its decision below the Sixth Circuit determined that the timeliness issue was one of substantive arbitrability which was therefore governed by its holding in *Vic Wertz Distributing Co. v. Teamsters Local 1038 National Conference of Brewery and Soft Drink Workers of the United States of America and Canada*, 898 F.2d 1136 (6th Cir. 1990). In following its *Vic Wertz* decision the Sixth Circuit declined to engage in a *de novo* review of the timeliness issue, finding that Interstate had implicitly agreed to have the arbitrator decide the arbitrability issue by submitting the issue to the arbitrator in the first instance. Accordingly, the court below reviewed and affirmed the arbitrator's ruling on timeliness based on the standard set forth in *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), by evaluating whether the award "draws its essence from the collective bargaining agreement." 909 F.2d at 888.

Before this Court Interstate argues that the Sixth Circuit decision presents a conflict with decisions of the Seventh, Third, District of Columbia and First Circuits concerning the scope of review of substantive arbitrability questions that have been initially submitted to the arbitrator. This case is not ripe for the resolution of the issue posed by Petitioner, however, because resolution of the supposed conflict will not change the result in the present case and can be made on other grounds. The apparent conflict results from confusion within the Sixth Circuit concerning whether grievance timeliness issues are procedural or substantive, an intra-circuit problem not appropriate for this Court to address.

The arbitrability issue below concerned the arbitrator's ruling on the timeliness of the grievance. An initial

determination that is necessary to ascertain the appropriate standard of judicial review is whether the question is a matter of procedural arbitrability or substantive arbitrability. If the issue is procedural, *Misco* instructs that courts must not disturb the arbitrator's ruling unless it amounts to "bad faith" or "affirmative misconduct." *Misco*, 484 U.S. at 40. Only if the issue is one of substantive arbitrability does it raise the question presented by Petitioner here of whether the courts should determine the matter *de novo* after an arbitrator has ruled on the arbitrability issue.

The conflict within the Sixth Circuit arises from cases in which it has found grievance timeliness to be a procedural question and other cases in which it has found timeliness to be a matter of substantive arbitrability. Compare *Local 12934 of International Union District 50, UMW v. Dow Corning Corp.*, 459 F.2d 221, 223-24 (6th Cir. 1972) and *Chambers v. Beaunit Corp.*, 404 F.2d 128, 131 (6th Cir. 1968) (both treating the question of whether a grievance is timely filed as a procedural question for the arbitrator to determine) with *General Drivers, Warehousemen and Helpers, Local Union No. 89 v. Moog Louisville Warehouse*, 852 F.2d 871 (6th Cir. 1988) (holding that grievance timeliness was a substantive arbitrability issue to be decided by the court), and *Vic Wertz*, 898 F.2d 1136 (implicitly finding that the timeliness issue was substantive).

Largely in an effort to avoid resolving the procedural/substantive conflict over grievance timeliness raised by its decision in *Moog*,[1] the Sixth Circuit in the

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[1] The Seventh Circuit has observed that the *Moog* decision is an anomaly at odds with decisions in eight other circuits. *Chicago Typographical Union v. Chicago Sun-Times*, 860 F.2d 1420, 1424 n. 4 (7th Cir. 1988).

case at bar incorrectly determined that the timeliness issue before the arbitrator was a matter of substantive arbitrability. Nevertheless, the Sixth Circuit rendered the correct decision on the ultimate issue of whether the arbitrator's ruling on grievance timeliness should be disturbed by the courts. While its rationale may have been based on an incorrect assumption regarding the timeliness issue, its *decision* that the arbitrator's timeliness determination should not be disturbed on review does not conflict with the decisions of other circuit courts upholding timeliness determinations. The rationale premised upon the misplaced finding that the timeliness issue was a matter of substantive arbitrability is the result of an intra-circuit decisional conflict which is not a matter for this Court to resolve.[2]

No conflict among the circuits exists because the Sixth Circuit's decision in this case can be justified on alternative grounds that do not raise a conflict. The applicable contract language in the present case permits a grievance to be filed within fifteen (15) days of "its occurrence or the parties' awareness thereof," and provides that an untimely grievance shall "automatically be decided in favor of the defending party." The contract

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[2] Petitioner has not raised the *Moog* question as appropriate for review here, presumably because Interstate prevailed on that issue below. Moreover, its Petition to this Court on the standard of review depends upon the Sixth Circuit following *Moog*. As argued *infra*, the contract language here is distinguishable from the language in *Moog* so that even an application of the *Moog* analysis would result in a finding that the timeliness issue here was procedural. This case, therefore, does not genuinely raise the *Moog* issue either.

contains no language which bars arbitrability of an untimely grievance sufficient to even arguably transform the issue into one of substantive arbitrability under the reasoning of *Moog*, 852 F.2d at 873, where the contract specifically stated that untimely grievances "shall not thereafter be arbitrable." The *Moog* court, in fact, distinguished contrary cases on this basis. Because the contract here contains no such bar to arbitration, the timeliness issue, including the arbitrator's finding that the discipline issued was a "continuing violation," is a procedural matter that this Court has long held to be for the arbitrator and not for the courts. *John Wiley & Sons v. Livingston*, 376 U.S. 543, 557 (1964). In fact, one of the pre-arbitration procedural issues raised in *Wiley* concerned the time limitations in the grievance procedure and whether the violations were continuing in nature. *Id.* at 556 n. 11. In *Wiley* the relevant contract language stated that failure to timely file a grievance "shall be construed and be deemed to be an abandonment of the grievance." *Id.* This language is not materially different from the contract language in the case at bar, compelling the conclusion that the timeliness issue was, in fact, a procedural issue for the arbitrator and not a substantive issue for the court to decide *de novo*. The case at bar, then, does not legitimately present the question of the appropriate scope of review of an arbitrator's ruling on a substantive arbitrability issue.

As a procedural issue for the arbitrator to decide, the appropriate standard of review is the "affirmative misconduct" standard enunciated in *Misco*, 484 U.S. at 40. This standard is more deferential to the arbitrator's determinations than the standard of whether the award "draws its essence" from the contract which was actually

applied by the Sixth Circuit below. Reviewed as a procedural ruling, therefore, the result would be the same as that reached by the court below and the arbitrator's ruling would remain undisturbed.

Even assuming, *arguendo*, that the grievance timeliness issue was a matter of substantive arbitrability and that the court was required to render a *de novo* review of the issue as argued by Petitioner, the result reached by the Sixth Circuit would not be changed. Although based on whether the arbitrator's decision on the issue drew its essence from the agreement, the discussion of the timeliness issue by the Sixth Circuit in the decision below demonstrates that the arbitrator reached the same result that would be reached upon a *de novo* review of the issue:

> The arbitrator determined that under the Agreement Furst's delay in filing the grievance resulted in his having waived the right to challenge the suspension of April 21, 1984. Despite this delay, the arbitrator concluded that the grievance was arbitrable as a continuing grievance that could be grieved at any time, "even though that grievance emphasizes the act of suspension rather than its continuing nature." Arb. Award at 6. Interstate contends that in so ruling, the arbitrator ignored the "unambiguous" language in Article VII, Section 3(a) of the Agreement requiring that a grievance be filed within fifteen (15) days of "its occurrence or the parties' awareness thereof." [sic] Specifically, Interstate contends that the conclusion that Furst had waived his right to challenge the April 21, 1984 suspension should have been the end of the arbitrator's inquiry.

* * *

> Here, the arbitrator's finding that the suspension was a "continuing act" or "occurrence" which could be grieved at any time does not appear to be based upon a misreading or modification of the language of the Agreement. The indefinite nature of Furst's suspension contemplated a continuing, day-to-day suspension (i.e., "occurrence"), the termination of which was to be conditioned upon a future event, the proving of his innocence, [sic] Rather, the arbitrator was construing the terms of the agreement, in particular the terms "occurrence" and "awareness," in light of an indefinite suspension pending the conviction or acquittal of an employee in a criminal case. Because we fail to see any inconsistency or contradiction between this ruling and any other language in the Agreement and we further find that the arbitrator was at least "arguably construing" the contract, we conclude that his decision on arbitrability draws its essence from the collective bargaining agreement.
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> * * *
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> The result sought by Interstate, as argued by the Union to the arbitrator, places Furst in a "twilight zone," both with and without a job, with no foreseeable means of escape.

909 F.2d at 891-92. Interstate here placed the grievant on an indefinite suspension, the continuation of which was conditioned upon the future event of the outcome of criminal proceedings against him. Such a *sui generis* form of discipline can be judged *only* on the basis of subsequent events, unlike a discharge or a suspension for a definite length of time. *Brown v. Dept. of Justice*, 715 F.2d 662, 669 (D.C. Cir. 1983). Clearly, the grievance here was

arbitrable because it was filed within fifteen (15) days of "its *occurrence* or parties' *awareness* thereof."

Whether the issue is resolved *de novo*, then, or deference is given to the arbitrator's determination of the timeliness question as a procedural issue, the result in the case would be the same and no justification remains to review this case since no conflict with decisions in other circuits can be shown. Petitioner nevertheless attempts to convince this Court to review the allegedly erroneous rationale employed by the Sixth Circuit to reach its correct result by raising the ominous specter of opening the floodgates of litigation and interfering with the federal policy favoring arbitration of labor disputes. This last ditch argument is both speculative and specious.

Interstate first argues that, at least in the Sixth Circuit, all questions regarding arbitrability will now be litigated in federal courts prior to arbitration because employers will fear the standard of review adopted by the Sixth Circuit for post-arbitration challenges of determinations regarding substantive arbitrability. Such speculation ignores at least two salient factors. First, an employer may nevertheless choose an arbitral determination of arbitrability rather than a judicial determination in the first instance for many reasons, including estimation of the likelihood of success, the greater expense of litigation and the delay involved. Second, the parties can easily circumvent the Sixth Circuit rationale by expressly agreeing, either on an *ad hoc* basis or as part of the contract, that *de novo* review of the substantive arbitrability issue is not waived by submitting it to arbitration.[3]

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[3] The Sixth Circuit implicitly acknowledged this solution to potential waiver in *Vic Wertz* when it noted that the parties

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A court would be required to effectuate such an agreement as it does any other term of an agreement between the union and the employer.

The flood-of-litigation argument should be rejected for the further reason that the problem exists within the Sixth Circuit due to decisional conflicts within the Circuit concerning the nature of the timeliness challenge to arbitration as noted above. Because of *Moog* parties in the Sixth Circuit may be unsure whether their contract language renders a timeliness challenge a matter of procedural arbitrability for arbitral determination or substantive arbitrability for judicial determination. It is not for this Court to protect the Sixth Circuit Court of Appeals against a flood of litigation caused by the confusion arising out of its own decisions. Further, because timeliness issues are in actuality procedural as argued *supra*, employers and unions within the Sixth Circuit are not detrimentally affected by the standard of review that Circuit currently applies to timeliness determinations by the arbitrator.

In sum, Petitioner failed to show that water will be pouring through the floodgates due to the decision in this case. In fact, the rationale of which Petitioner is so fearful was not adopted by the Sixth Circuit in the case below, but was first announced in *Vic Wertz*, decided March 22, 1990, and Petitioner has not sought to prove that the

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submitted the arbitrability issue to the arbitrator "without reservation." 898 F.2d at 1140.

predicted horror of litigation has come to pass. This red herring ground for review should be rejected out of hand.

III. This Case Does Not Present A Clear Conflict With Other Circuits On The Issue Of Whether The Arbitrator's Award Should Be Vacated On Public Policy Grounds.

Petitioner argues that the decision in this case raises a clear conflict with decisions in other circuits on the question left open by this Court in *United Paperworkers International Union, AFL-CIO v. Misco*, 484 U.S. 29, 45 n. 12 (1987). Contrary to Petitioner's contention, however, the Sixth Circuit below did not answer the open *Misco* question because this case did not present appropriate facts upon which to resolve the question. Moreover, the purported decisional conflict with other circuit courts is a conflict of rationale only which does not affect the result below because this case is factually distinguishable from the cases decided in other circuits. If any conflict exists upon which this Court should grant review, it is a conflict between the Second Circuit Court of Appeals decision in *Newsday, Inc. v. Long Island Typographical Union, No. 915, CWA, AFL-CIO*, 915 F.2d 840 (2nd Cir. 1990), which is presently pending before this Court on Petition for Writ of Certiorari in Cause No. 90-1166 and the decision of the Ninth Circuit in *Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173, International Association of Machinists and Aerospace Workers*, 886 F.2d 1200 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 109 L Ed 2d 531, 110 S.Ct. 2205 (1990).

Petitioner's erroneous contention that this case presents a conflict over the question left open in footnote 12

of the *Misco* decision stems in part from confusion over the precise question left open in *Misco*. Because the facts did not warrant it, this Court in *Misco* expressly declined to resolve an issue presented to it on argument:

> We need not address the Union's position that a court may refuse to enforce an award on public policy grounds only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law.

484 U.S. at 45 n. 12. The Ninth Circuit in *Stead Motors*, 886 F.2d at 1212 n. 12, interprets the reserved *Misco* question as the precision with which a public policy must be defined, i.e., whether a challenging party "must demonstrate that enforcement of the award would actually violate 'a statute, regulation or other manifestation of positive law.' "[4] Interstate, on the other hand, contends that a second open question in *Misco* is whether a court should evaluate enforcement of the arbitrator's award (i.e., the relief ordered) or the grievant's underlying conduct when assessing whether public policy will be violated.

Local 135 contends that the Ninth Circuit is correct in its delineation of the question reserved by the *Misco* court. Like the *Stead Motors* court, then, the Sixth Circuit

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[4] Because the Ninth Circuit held that *Misco* requires a demonstration that the *relief* ordered by the arbitrator violates public policy rather than the underlying conduct which gave rise to the grievance, the court expressly stated that it left open the question reserved in *Misco* concerning how precisely public policy must be defined since it was not necessary to reach that issue under the facts presented.

in this case did not address the *Misco* question because the precise scope of the public policy was not sufficiently at issue once it was determined that the arbitrator's award was at issue and not the grievant's underlying conduct.

The *Stead Motors* court correctly interpreted *Misco* to require an evaluation of the arbitrator's award in determining the public policy question. In *Misco* this Court merely reiterated and explained its holding in *W.R. Grace & Co. v. Local Union 759, International Union of the United Rubber Workers*, 461 U.S. 757 (1983). This Court in *W.R. Grace* was called upon to determine whether the *relief* of back pay for seniority violations in conducting layoffs ordered by the arbitrator violated public policy because it penalized the employer for complying with a Title VII conciliation agreement. The *Misco* court thus noted that the *W.R. Grace* decision "turned on our examination of whether the *award* created any explicit conflict with other 'laws and legal precedents' " [emphasis added]. 484 U.S. at 43. The issue with which the *Misco* court grappled was the manner in which the lower court ascertained and defined public policy, and not whether enforcement of the reinstatement award rather than the employee's underlying conduct violated public policy, a question which was settled by *W.R. Grace*. In *Misco* which also involved the discharge of an employee for a drug related offense, the Court considered whether "his reinstatement would actually violate the public policy identified. . . ." 484 U.S. at 44. The arbitral relief (reinstatement in the case of a discharge), then, is the conduct to be measured against the identified public policy, and not the employee's conduct which led to the discharge.

Accordingly, the Sixth Circuit correctly dealt with the question presented in accordance with *Misco* by evaluating whether reinstatement of the grievant violated public policy, rather than whether the conduct which led to his discharge violated criminal laws or some other identified public policy as argued below by the Petitioner. Just as this Court did in *Misco*, the Sixth Circuit evaluated the lower court's attempt to define public policy and properly concluded that "[t]he district court failed to identify any law or legal precedent with which that arbitrator's reinstatement order would conflict." *Interstate Brands*, 909 F.2d at 893. While the district court, as Interstate notes, did make reference to state laws outlawing driving under the influence, the Sixth Circuit's conclusion that the district court failed to adequately identify an applicable public policy is nevertheless correct because the grievant was not arrested or convicted for driving under the influence, and more importantly, did not engage in the cited misconduct in the performance of his job duties. Therefore, the reliance on state intoxication laws is misplaced as noted by the Sixth Circuit:

> While it is indisputable that allowing intoxicated persons to drive motor vehicles violates public policy, it does not follow, however, that any arbitration award reinstating an employee discharged for being intoxicated while off-duty, or arrested for off-duty possession of controlled substances may never be enforced without violating the public policy exception of arbitration awards.

Id. Since no *applicable* public policy was identified by the district court, the present case parallels *Stead Motors* and does not present a vehicle for this Court to answer the

question reserved in *Misco* concerning the precision with which the public policy must be defined. In contending that this case provides an opportunity for this Court to answer the *Misco* question, therefore, Petitioner is wrong.

Regardless of whether the *Misco* question was addressed in this case, review is nevertheless inappropriate because no clear conflict exists between the decision in this case and that in other circuits. Interstate contends that decisions in the Eleventh, Eighth, Fifth[5] and Second Circuits conflict with the decision in the case at bar. Interstate further contends that the Sixth Circuit has aligned itself with the Ninth Circuit in *Stead Motors* in resolving the public policy issue. Even assuming, *arguendo*, that the important conflict to be resolved is the relevance of the employee's underlying misconduct to the public policy determination, the case at bar does not present a true conflict on this issue because the determinative material facts are distinguishable from the cases in other circuits. The underlying misconduct in the case at bar is not sufficiently connected with the grievant's employment to warrant finding a public policy violation even under the standard applied in the Eighth and Eleventh Circuits.

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[5] It should be noted that the cited decision from the Fifth Circuit, *Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local Union 540 vs. Great Western Food Company*, 712 F.2d 122 (5th Cir.), *reh'g den.*, 717 F.2d 1399 (1983), is a pre-*Misco* decision and therefore does not present an appropriate ground for review on the basis of a conflict among the circuits. Especially since this Court in *Misco* reversed the Fifth Circuit on the issue, it would be improvident to grant review based on an alleged conflict with a circuit court decision issued before the circuit had an opportunity to be guided by *Misco*.

In both *Delta Air Lines v. Airline Pilots Association International*, 861 F.2d 665 (11th Cir. 1988), *reh'g den. en banc*, 867 F.2d 1431, *cert. denied*, ___ U.S. ___, 107 L Ed 2d 154, 110 S.Ct. 201 (1989), and *Iowa Electric Light & Power Co. v. Local 204 of the International Brotherhood of Electrical Workers*, 834 F.2d 1424 (8th Cir. 1987), the employee misconduct occurred in the performance of the employees' job duties, unlike the instant case which involved off duty conduct. The Eleventh Circuit in *Delta Air Lines*, in fact, belabored this critical distinction. The court distinguished its own prior decision in *Florida Power Corp. v. International Brotherhood of Electrical Workers*, 847 F.2d 680 (11th Cir. 1988), and *Misco* on the ground that the employee misconduct (which in both cases was drug-related) was "off company time" unlike the on duty conduct at issue in *Delta Air Lines*. With on duty conduct it is "the employee *qua* employee who is the wrongdoer." 861 F.2d at 671. The *Delta Air Lines* court reasoned that it was the grievant's "*employment* which made his intoxication violate the law and public policy" [emphasis added]. *Id.* The Eleventh Circuit thus defined the proper question under *Misco* to be " 'Does an established public policy condemn *the performance of employment activities in the manner engaged in by the employee*?' " [emphasis added], 861 F.2d at 671, and *not* whether the employee's conduct "in the abstract" violated public policy. *Id.* This distinction is critical and explains the Eleventh Circuit's prior decision in *Florida Power*, which rejected a public policy challenge to the reinstatement of an employee who was arrested *off duty* for driving while intoxicated and for possession of cocaine.

While *Delta Air Lines* involved an employee who was intoxicated on duty, *Iowa Electric* involved an employee who deliberately violated a federally mandated safety regulation in the performance of his duties at a nuclear power plant. As in *Delta Air Lines*, it was the grievant's performance of his job duties that rendered his conduct a violation of public policy.

The importance of the off duty nature of the employee misconduct to the courts which choose to evaluate the underlying employee conduct is highlighted by a pre-*Misco* decision in the Fifth Circuit, *Oil Chemical and Atomic Workers International Union, Local 4-228 v. Union Oil Company of California*, 818 F.2d 437 (5th Cir. 1987). Even before this Court reversed the Fifth Circuit in *Misco*, that court in *Union Oil* found that an arbitrator's award reinstating an employee guilty of off duty drug use did not violate public policy. While the Fifth Circuit was concerned about evidence of post-award drug use by the employee, it remanded the case *to the arbitrator* to make the determination of whether the subsequent conduct rendered reinstatement against public policy. Given the Fifth Circuit stance on off duty drug use, Interstate has erroneously listed the Fifth Circuit as a court in conflict with the Sixth Circuit in the case below involving off duty conduct.

In contrast to the on-the-job employee conduct at issue before the circuits cited by Petitioner, the employee conduct at issue here occurred off duty and off company premises. The grievant, Randy Furst, and a friend were approached by a police officer while they were parked in a van on the side of the road on their way home from a Cincinnati Reds baseball game in Cincinnati, Ohio. It is

uncontroverted that Furst was sitting in the passenger seat of the van and there is no evidence or finding that he ever drove the van. Furst was subsequently arrested and indicted in Kentucky for possession of cocaine, marijuana and drug paraphernalia. Upon the police officer's recommendation, Furst entered into a criminal diversion program which he successfully completed, including participation in a rehabilitation program, and all criminal charges against him were ultimately dropped.

Furst was thus apprehended on his day off, and away from company premises in contrast to the employee charged with marijuana possession in *Misco*. Furst's conduct, therefore, was in no way connected with his employment and is more akin to the conduct of the employee in *Misco* rather than to the employee in *Delta Air Lines* and *Iowa Electric*. Especially in light of the Eleventh Circuit's decision to uphold the arbitrator's award regarding off duty drug trafficking in *Florida Power* it cannot be said that the Eleventh and Eighth Circuits would reach a different conclusion on the facts presented in the instant case. The nexus between Furst's misconduct and his performance of his employment duties is insufficient to establish a public policy violation by his reinstatement.[6] Applying the question posed by the Eleventh

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[6] The Tenth Circuit has emphasized the importance of the connection between the misconduct and the employee's job duties even with on duty misconduct, and has distinguished *Delta Air Lines* on that basis. *Communications Workers of America v. Southeastern Electric Cooperative of Durant, Oklahoma*, 882 F.2d 467 (10th Cir. 1989) (upholding reinstatement of employee engaged in on-the-job sexual harassment).

Circuit in *Delta Air Lines*, whether public policy condemns the performance of employment activities in the manner engaged in by the employee, no public policy violation can be established because Furst engaged in no misconduct while performing his employment activities.

Interstate attempts to avoid this result by inviting this Court to engage in the very impermissible fact-finding that was expressly prohibited in *Misco*. Thus, as noted in the Statement of the Case, *supra*, Interstate asks this Court to find facts and draw inferences beyond those found by the arbitrator by referring to testimony upon which there was conflict and seeking consideration of facts which the arbitrator effectively excluded (the post-suspension DWI convictions).

The error of such an inquiry is highlighted by this Court's analysis in *Misco*. The employee in *Misco* was arrested after being apprehended in the backseat of his car in the company parking lot with marijuana smoke in the air and a lighted marijuana cigarette in the front seat ashtray. A warrant search of his house also revealed marijuana. He was arrested and charged with possession of marijuana. An arbitrator reinstated the employee in part because the company failed to prove that he had possessed or used marijuana on company property.

Assuming for the sake of argument only the existence of a public policy against performance of the employee's job duties (operation of dangerous machinery) while under the influence of drugs, this Court went on to find that no violation of that policy was demonstrated. This Court found that it was improper for the Court of Appeals to draw the inference that illegal drugs in the

employee's car in the company parking lot established "actual use of the drugs *in the workplace* . . . " [emphasis added]. *Misco*, 484 U.S. at 44. The *Misco* court made clear that a public policy violation could be premised *only* upon a finding that the employee actually performed his job duties under the influence of drugs. This Court explained the impermissible speculation of the lower court on this issue as follows:

> To conclude from the fact that marijuana had been found in Cooper's car that Cooper had ever been or would be under the influence of marijuana while he was on the job and operating dangerous machinery is an exercise in fact finding about Cooper's use of drugs and his amenability to discipline, a task that exceeds the authority of a court asked to overturn an arbitration award. . . . Had the arbitrator found that Cooper had possessed drugs on the property, yet imposed discipline short of discharge because he found as a factual matter that Cooper could be trusted not to use them on the job, the Court of Appeals could not upset the award because of its own view that public policy about plant safety was threatened.

484 U.S. at 44-45.

In the case at bar, no finding was made that Furst used drugs on the job or that he was likely to, although that is just the factual finding that Interstate asks this Court to make in overturning the arbitrator's award. The fact that the arbitrator here reinstated Furst is the result of his implicit findings that Furst is either amenable to the discipline imposed or can be trusted not to perform

his job duties under the influence of drugs or alcohol.[7] These findings by the arbitrator are what the parties bargained for.

If Interstate is not requesting this Court to engage in impermissible fact finding regarding Furst's use of drugs on the job and his amenability to discipline, then the only argument Interstate can be making is that if an employee's conduct violates some law or well defined and dominant public policy, regardless of its nexus to performance of his job duties, a reinstatement award is unenforceable as against public policy. Such an approach would render arbitration of discipline cases a hollow formality. Interstate effectively seeks to have this Court find that an employee whose conduct, off duty or otherwise, has violated some law or regulation governing his conduct in society, e.g., traffic laws, gambling laws, criminal laws against such offenses as assault and battery, writing bad checks, tax evasion, etc., would be unenforceable. This approach, which invites courts to look beyond the legality of the arbitration award to the legality of the grievant's conduct, permits no limiting principles and

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[7] Interstate places undue emphasis upon Furst's post-award 1986 impaired driving offenses and contends that the court should have considered them. In his supplemental award, the arbitrator declined the opportunity to accord weight or relevance to the post-discharge offenses and the Sixth Circuit appropriately declined to circumvent the arbitrator's judgment. Even the Fifth Circuit, a court which Interstate lists in the opposing camp, agrees that the effect on reinstatement of such post-award behavior is solely for the arbitrator to determine. *See OCAW, Local 4-228 v. Union Oil Company of California, supra.*

totally undermines the federal policy favoring arbitration.[8]

Misco does not permit such an approach and teaches that an arbitrator's bargained-for award of reinstatement constitutes an implicit finding that the employee is not likely to engage in the misconduct on the job in the future, whether or not he did in the past. A court is not permitted to second guess that finding. Assuming, as did the *Misco* court, that the applicable public policy is prohibition against Furst's operation of his company vehicle while under the influence of drugs or alcohol, no violation of that policy has been shown in this case because there has been no finding regarding Furst's "actual use of drugs in the workplace" or even his use of drugs while operating a motor vehicle off duty. The facts of this case, therefore, fail to present the precise issue decided in *Delta Air Lines* and *Iowa Electric*, and most recently by the Second Circuit in *Newsday*, concerning the appropriate consideration to be given employee misconduct that occurs *on the job* and violates some law, legal precedent or other well defined and dominant public policy.

Admittedly, the Ninth Circuit in *Stead Motors* answered that question differently than did the Eleventh, Eighth and Second Circuits. And unlike the case at bar,

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[8] See 29 U.S.C. §173(d), which codifies this policy as follows:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

Stead Motors concerned an employee's misconduct in the performance of his job duties (an auto mechanic's failure to properly tighten lug bolts). This Court should not grant certiorari in the case at bar even if it determines that this conflict requires resolution. The union in the subsequently decided Second Circuit *Newsday* case has filed a Petition for Writ of Certiorari in this Court in Cause No. 90-1166. Unlike the case decided by the Sixth Circuit below, *Newsday* involved an employee who engaged in misconduct while on the job. The *Newsday* court appears to have adopted the approach of the Eighth and Eleventh Circuits, which looks to the public policy outlawing the employee on-the-job misconduct rather than to public policy outlawing reinstatement of an employee who engaged in on-the-job misconduct as did *Stead Motors*. If an important conflict among the Circuits is perceived and this Court finds it appropriate to resolve that conflict, then review should be granted in *Newsday* where the facts are materially identical to those in opposing circuits.

In the case below, no real conflict exists because application of the opposing approach would render the same result, i.e., enforcement of the arbitrator's award. Just as the Eleventh Circuit upheld the reinstatement for off duty misconduct in *Florida Power* enforcement was the proper result here, regardless of which approach is proper with regard to on duty conduct.

CONCLUSION

This case does not present an appropriate opportunity for this Court to address the two questions presented for review because material factual differences between the present case and the cited conflicting cases enable this Court to uphold the decision below on other grounds without resolving the purported conflict. The proper result was reached by the Sixth Circuit on all issues presented, and it would be improvident for this Court to grant review when the case below can be factually distinguished without reaching the questions presented for review. For all of the reasons argued above, Respondent urges this Court to deny the Petition for Writ of Certiorari in this case.

Respectfully submitted,

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APPENDIX

[1] ARBITRATION

INTERSTATE BRANDS CORPORATION, Butternut Bread Division Teamsters 135	:	FMCS NO. 85 K/01426

Grievance of Randy Gene Furst	:	GRIEVANCE NO. 71167

TRANSCRIPT OF PROCEEDINGS

The above-entitled cause came on for Arbitration before Arthur Porter, Jr., at the offices of Frost & Jacobs, 2500 Central Trust Center, on Tuesday, February 26, 1985, at 10 o'clock a.m.

* * *

[44] inserted the needle. Other than that, I can't remember any bruises. There may have been from the past, you know, needles but I'm not positive.

Q. You said that he indicated to your he had some sort of problem with –

A. Yes, sir. Yes, sir, he did.

Q. With what?

A. With cocaine.

Q. Did he indicate how long had he been using it?

A. He couldn't remember. He told me for quite some time he had been injecting cocaine which is unusual to find people who actually mainline cocaine. He said he had been shooting up several times a day because of the habit.

Q. When and where did he make that statement?

A. It was at our station headquarters.

Q. In your presence?

A. Yes, sir.

Q. And who else was present?

A. I believe my lieutenant was there at the time, Lieutenant Watts.

Q. Was that statement recorded in any way?

A. It was on tape or anything like that, no, it was not. I may have recorded it in my report. No, it's not recorded in the report.

[45] Q. I notice that that is not anywhere indicated in your report which is Company Exhibit 1. Is there any reason why you omitted that from the report?

A. None, other than I didn't feel it was necessary.

Q. You didn't feel that a statement like that was necessary to be in the report?

A. No. It would – I felt it would not have had any outcome as far as, you know, the possession charge goes in court.

Q. Was Mr. Furst released after a short stay in jail?

A. He was let out on bond. I'm not sure what the bond was.

Q. Do you know how long he served in jail?

A. I really couldn't tell you.

Q. Was it just a short period for the processing and the setting of the bond?

A. I would say he probably got out either late on the 11th or early on the 12th. I'm not positive when he did get out though.

Q. Was there any indication or evidence that Mr. Furst or did you observe Mr. Furst at any time operating the van –

[46] A. No, sir, I didn't.

Q. – That you found him in?

A. No.

Q. Which seat was he sitting in?

A. He was in the passenger seat.

Q. Did you ask who had been driving the van?

A. Yes, I did. Mr. Meisberger stated, along with Mr. Furst, that Mr. Meisberger was driving it. That's who I saw get out of the driver's side at the time.

Q. Did you observe Mr. Furst using or injecting cocaine?

A. No, sir, I did not. Not at that time.

Q. Did you request that a blood test be run or be conducted?

A. I did not, no, for the simple reason that he was not the driver of the vehicle and he was not charged with driving under the influence of alcohol. I just wanted him checked out by the paramedics and possibly the hospital to make sure he was safe to be placed in the county jail.

Q. Is it usual that after apprehending someone in the possession of drugs that you would not have him subjected to a blood alcohol or blood test or some sort?

A. Is that unusual?

Q. Is that unusual or usual?

* * *

[128] Q. What time did you leave in the morning?

A. I would say around 10 o'clock in the morning. The game would have been around 2 o'clock game, somewhere in that neighborhood. We gave ourselves enough time to get to the ball game.

Q. Did you take anything with you?

A. As in what?

Q. Did you take anything with you in the van or in the –

A. I took a cooler of beer.

Q. Did your friend have anything with him?

A. Yes, he had the substance with him.

Q. Prior to April the 11th had you ever experimented with cocaine or some other substances?

A. Yes, I had.

Q. And when did you first –

A. It was probably about a week to ten days before that I was with that guy another time before and he got me started on it.

Q. Prior to that you had never experimented with it?

A. No, sir.

Q. Did you ever inject cocaine at any time on April 11th or prior to April the 11th?

[129] A. No, sir.

Q. Tell us what happened. You went to the ball game, did you drink some beer at the ball game?

A. Yes, sir, we drank beer at the ball game and was on our way back.

Q. And tell us what happened from that point?

A. Well, it's closer to go through 275 to where we live, so we started that direction and the van was running hot. We pulled if off the side of the road to let it cool a little, and that's when Officer Bunning proceeded to arrest us.

Q. Whose cocaine and paraphernalia was that that Officer Bunning brought with him?

A. It belonged to Mark Meisberger.

Q. Did you inject any cocaine on that day?

A. Not on that day I did not.

Q. Did you have any needle marks in your arm?

A. I had some scratches on my arm, up and down my arms. I have might have had one. I didn't have all the markings that was said that I had.

Q. At this time were you a regular cocaine user?

A. No, sir.

Q. Have you used cocaine at any time since April the 11th?

[130] A. About a week prior. I just got with the wrong –

A. After your arrest did you –

A. Oh, no, sir.

Q. How did you let the company know that you had been arrested? What did you do to inform the company or did you do anything?

A. When I was arrested I called my brother-in-law, which is an employee at Butternut, I told him to call the supervisor and tell him I was in jail and it would probably be Thursday, my next scheduled day to work, that I would get out so I was going to have to stay a day and have to take a day off from work.

Q. When were you released from jail?

A. Thursday about 2 o'clock in the afternoon.

Q. At the time of your arrest had you ever had any trouble with the law at all?

A. No, sir.

Q. I think there is already sufficient evidence in the record as far as the criminal proceedings that occurred after your arrest. You did then enter into or your attorney did on your behalf enter into a diversion agreement with the state of Kentucky?

A. Yes, sir.

* * *

[132] A. Yes.

Q. I see. And I take it that you have never then been tried on the charge of possession of cocaine?

A. No, sir.

Q. Did you ever receive any letter of suspension from the company?

A. No, sir.

Q. I think the grievance bears a date. Why did you file the grievance on the date that you filed it?

A. Okay. I called Pete and told him I was being suspended and he said well, did you get your letter of suspension and I said no. He said well, we have got to wait for a letter of suspension before you can really file a grievance.

So in the meantime Pete, I guess, was on vacation and when I come back he had to go to the hospital. Well, a friend of mine had talked to a union representative from Edinburg which is Dick Romeril and Dick told me – I was telling him about my case and he said for me to get down there and file a grievance.

Q. And you did?

A. And I did.

Q. Did you at any time during the course of April 11th in your arrest ever tell any officer of Officer Bunning [133] or any other person that you were a drug addict or a cocaine addict?

A. No, sir, I never did.

Q. Did you ever state or remark to anyone that you were a frequent user of cocaine?

A. No, sir, I did not.

Q. Were you intoxicated at the time of your arrest?

A. Yes, I probably was. I had quite a few beers that day.

Q. At the time of the arrest had you injected or done any cocaine?

A. No, sir. I was scared to death when the officer pulled his gun up to my head. I have had a series before of hyperventilation and I was having trouble breathing at the time and that was the reason why I was slurring. I was nervous, I couldn't talk, I couldn't do nothing.

Q. If you were intoxicated, however, it was as a result of consumption of beer; is that your testimony?

A. Yes.

MR. GROTH: You may cross-examine.

THE ARBITRATOR: If you want a few minutes or do you want to start right in.

* * *
